IN THE SUPREME COURT
OF THE STATE OF FLORIDA

QUINTON DRYDEN, et al.,

Petitioners,

vs.

MADISON COUNTY, FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
CASE NO. 87,594

BRIEF OF AMICUS CURIAE FLORIDA HOME BUILDERS ASSOCIATION

IN SUPPORT OF PETITIONERS

KEITH C. HETRICK
Florida Bar Number 0564168
Florida Home Builders
Association
201 East Park Avenue
Tallahassee, Florida 32301
(904) 224-4316

ROBERT M. RHODES
Florida Bar Number 183580
VICTORIA L. WEBER
Florida Bar Number 266426
Steel Hector & Davis LLP
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301
(904) 222-2300

ATTORNEYS FOR
FLORIDA HOME BUILDERS
ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

STATEMENT OF THE CASE AND FACTS

Amicus Florida Home Builders Association ("FHBA") adopts the statements of the case and facts, as presented in the Initial Brief of Petitioners, Quinton Dryden, et al. ("Taxpayers").

INTEREST OF AMICUS CURIAE

FHBA is a Florida not-for-profit corporation and statewide association of approximately 18,000 builders, developers, and property owners. A significant number of FHBA members have paid, and will in the future pay, taxes, special assessments and development exactions similar to the assessments at issue in this case. This Court's determination as to the circumstances under which local governments must refund monies exacted unlawfully is of particular import to FHBA and its members. FHBA supports the position of the Taxpayers that illegal assessments must be refunded.

SUMMARY OF THE ARGUMENT

The doctrine of "prospectivity" that provides the foundation for Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), has been eroded severely, particularly in tax cases, and should not be employed to defeat refunds of unlawful exactions, assessments and taxes. Exaction of a tax or assessment where there is no power to do so constitutes an unlawful taking of property without due process of law. The Due Process Clause of the Fourteenth Amendment requires that taxpayers be afforded access to either a predeprivation process before parting with

their money, or meaningful backward-looking relief. When money must be paid to avoid financial sanctions or seizure of property, the payment is considered made under duress, and the state has not provided a fair and meaningful predeprivation process. Such is the case here. Therefore, Taxpayers are entitled to meaningful, backward-looking relief in the form of refunds of these unlawfully exacted assessments.

Madison County requests application of the doctrine of "prospectivity" adhered to in Gulesian and explained in detail in Chevron Oil Co. v. Huson, 404 U.S.97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). However, the Chevron prospectivity analysis has been limited severely in recent years by James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); and Harper v. Virginia Department of Taxation, __ U.S. __, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). Also, the remedy issues implicated by Gulesian have since been clarified by McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) and Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994).

For these reasons, taxpayers are entitled to refunds of illegal exactions, assessments and taxes, and Gulesian should be overruled to the extent that it is interpreted as a means to avoid such refunds.

TAXPAYERS ARE ENTITLED TO REFUNDS OF ILLEGAL EXACTIONS, ASSESSMENTS AND TAXES, AND GULESIAN SHOULD BE OVERRULED TO THE EXTENT THAT IT IS INTERPRETED AS A MEANS TO AVOID SUCH REFUNDS.

A. THE DUE PROCESS CLAUSE REQUIRES THAT TAXPAYERS BE AFFORDED EITHER ACCESS TO A PREDEPRIVATION PROCESS PRIOR TO PARTING WITH THEIR MONEY, OR MEANINGFUL BACKWARD-LOOKING RELIEF.

The exaction of a tax or assessment where there is no power to do so constitutes a taking of property which implicates Due Process concerns. McKesson Corp. v. Florida Alcoholic Beverages and Tobacco Div., 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), 110 S.Ct. 2238, at 2241. In the present case, the First District Court of Appeal recognized the relationship of this "takings" issue to the imposition of invalid special assessments. In Madison County v. Foxx, 636 So.2d 39, 50 (Fla. 1st DCA 1994), the Court explained that: "[g]enerally, the exaction of an assessment of benefits against property which there was no power to impose is an unconstitutional taking of property without due process of law. "[Citations omitted.]

Where taxes and other exactions are concerned, Taxpayers are entitled to access to either a predeprivation opportunity to challenge the exaction without penalty, or meaningful backward-looking relief to remedy illegal exactions, pursuant to the United States Supreme Court's ruling in McKesson. McKesson recognized that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." 496 U.S. at 36, 110 S. Ct. at 2250. [citations omitted.] In explaining this rule, McKesson quoted from Ward v. Love County Board of

Comm'rs, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920), a decision reversing the Oklahoma Supreme Court's refusal to award a refund of unlawful taxes to the Choctaw Indian Tribe. The Choctaw Tribe had paid tax to avoid sale of its lands, and sued for a refund. In ordering the refund, the Ward Court explained:

> To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State. Ward, 253 U.S. at 24, 40 S. Ct. at 422.

Due Process was the issue in McKesson, which addressed the question of whether it was permissible for the Florida Supreme Court to apply prospectively its ruling invalidating a discriminatory scheme for taxing alcoholic beverages. In National Distributing v. Office of Comptroller, 523 So.2d 156 (Fla. 1988), Justice Barkett, writing for the Court, explained why prospective application was appropriate:

> Unreasonable disruption of state government would be caused by retroactive application, and an unconscionable windfall would accrue to appellants. Retroactive application would have the effect of requiring the taxpayers of this state to refund in excess of an estimated $350 million in taxes that they already have paid. We thus find that any benefit to appellants is far outweighed by the harm that would be inflicted upon this state's citizens and their government.
>
> . . .
>
> We cannot conclude that the state has acted in bad faith.
>
> . . .
>
> Based on these facts, we find that the equities of this case disfavor appellants on the question of a tax refund, requiring that this opinion be given an exclusively prospective application. See Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973); McKesson [Division of Alcoholic Beverages & Tobacco

v. McKesson Corp.]; Gulesian v. Dade County School Board., 281 So.2d 325 (Fla. 1973). Equitable relief properly was denied appellants. Id. at 158.

However, in reversing the Florida Supreme Court's decision, the United States Supreme Court explained that:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. McKesson, 496 U.S. at 31, 110 S.Ct. at 2247.

There can be no question after McKesson that persons who are wrongly deprived of their tax or assessment dollars are entitled to protection under the Due Process Clause. Here Taxpayers were deprived of funds that the First District found to constitute illegal assessments, and, as such, Taxpayers are entitled to protection under the Due Process Clause.

B. TAXPAYERS LACKED ACCESS TO A FAIR AND MEANINGFUL PREDEPRIVATION PROCESS, AND THEREFORE ARE ENTITLED TO MEANINGFUL, BACKWARD-LOOKING RELIEF.

The method used for collection of special assessments during 1989 and 1990 offered Taxpayers the choice of paying the special assessments promptly or suffering the risk of penalties, interest, and liens and loss of their property. Under similar circumstances, the taxpayers in McKesson were found to have no meaningful predeprivation remedy. McKesson, 110 S. Ct. at 2251.

The McKesson Court explained that:

> We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress" in the sense that the State has not provided a fair and meaningful predeprivation procedure. See, e.g., United States v. Mississippi Tax Comm'n, 412 U.S. 363, 368, 93 S.Ct. 2183, 2187, 37 L.Ed. 2d 1 (1973) (economic sanctions for nonpayment); Ward v. Love County Board of Comm'rs, 253 U.S. 17, 23, 40 S.Ct. 419, 421 64 L.Ed. 751 (1920) (distress sale of land); Gaar, Scott & Co. v. Shannon, 223 U.S. 468, 471, 32 S.Ct. 236, 237, 56 L.Ed. 510 (1912) (both). Justice Holmes suggested in Atchison T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, 32 S.Ct. 216, 56 L. Ed. 436 (1912), that a taxpayer pays "under duress" when he proffers a timely payment merely to avoid a "serious disadvantage in the assertion of his legal...rights" should he withhold payment and await a state enforcement proceeding in which he could challenge the tax scheme's validity "by defence in the suit." O'Connor, 223 U.S. at 286, 32 S.Ct., at 217. . . .McKesson, 496 U.S. at 39, 110 S. Ct. 2251, Note 21.

Therefore, since Taxpayers lacked a clear and certain predeprivation remedy, they are entitled to meaningful backward-looking relief in the form of refunds.

C. THE DOCTRINE OF "PROSPECTIVITY" ARTICULATED IN CHEVRON AND RELIED UPON IN GULESIAN HAS BEEN LIMITED SEVERELY BY BEAM AND HARPER.

County suggests that this Court should rely on Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), to give prospective application to the First District Court's finding that the assessments at issue are null and void. In Gulesian, the Florida Supreme Court affirmed the trial judge's holding that "...his ruling would not operate retroactively to invalidate the excess of .82 mills over 10 mills nor require the refunds sought because of equitable considerations." Id. at 326. In so deciding, the Court cited agreement with the trial judge's resort to equitable considerations, and urged comparison with a line of cases starting with Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). In Lemon, the United States Supreme Court

approved prospective application of its prior decision invalidating a Pennsylvania statute that provided for reimbursement of nonpublic sectarian schools for secular educational services. In reaching its decision, the Lemon Court discussed the evolution of the doctrine of nonretroactivity and the tests for nonretroactivity articulated in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965), in the criminal area, and Chevron, in the civil arena. However, after Lemon and Gulesian were decided, Linkletter was expressly overruled by Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649(1987), and Chevron was undermined by James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), and Harper v. Virginia Department of Taxation, __ U.S. __, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

In 1971, in Chevron, the United States Supreme Court articulated criteria for giving a court decision prospective application only. The three criteria include: (1) the decision establishes a new principle of law; (2) prospective application avoids injustice or hardship; and (3) prospective application will not unduly undermine the purpose and effect of the new principle of law. Chevron, 404 U.S. at 106-107, 92 S.Ct., at 355-356.

In 1991, in Beam, the United States Supreme Court reviewed a Georgia Supreme Court decision that applied the Chevron analysis to deny a tax refund. Beam, like McKesson, involved state alcoholic beverage taxes. The taxpayer in Beam sought to recover excise taxes collected under a law declared unconstitutional for the same reasons that this Court held Florida's discriminatory taxing scheme unlawful in the first McKesson case, Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), rev.'d in part, 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed. 2d 17 (1990). The Georgia Supreme Court denied the refund, and

held that its declaration of unconstitutionality should be applied prospectively under the Chevron decision.

In reversing this ruling, the United States Supreme Court explained that, "[i]n the ordinary case no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar." Beam, 111 S. Ct. at 2442. However, the United States Supreme Court, citing Chevron, acknowledged that it had infrequently resorted to pure prospectivity. Id. The Court said that it would not speculate as to the bounds or propriety of pure prospectivity; however, it also noted that "[a]ssuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small of number of cases..." Beam, 111 S. Ct. at 2448, 2446. Justices Marshall and Blackmun joined in Justice Scalia's concurring opinion finding both selective and pure prospectivity beyond the Court's power to "say what the law is." Beam, 111 S. Ct. at 2450-2451.

Subsequent to Beam, the Court again considered the Chevron analysis. In 1993, in Harper, the Court was called upon to decide whether the Virginia Supreme Court correctly denied refunds of state income taxes to federal retirees. Harper reiterated the point that retroactivity was the norm, and reversed Virginia's denial of the refunds, explaining that Virginia's efforts to incorporate the Chevron analysis into state law was not permitted under the Supremacy Clause, U.S. Const., Art. VI, Cl. 2. Harper, 113 S.Ct. at 2518.

Again, Justice Scalia, in a concurring opinion, expressed his displeasure with the doctrine of prospectivity, calling it "the handmaid of judicial activism" and "the born enemy of stare decisis," and urging reconsideration of Chevron. Harper, 113 S. Ct. at 2521-2522. In a dissenting opinion, Justices O'Connor and Rehnquist complained that "[r]ather than limiting its

pronouncements to the question of selective prospectivity, the Court intimates that pure prospectivity may be prohibited as well." Harper, 113 S. Ct. at 2527.

After Gulesian, the foundation for the United State's Supreme Court's pronouncements on prospectivity in Lemon were severely eroded. And cases involving illegal taxation, in contravention of federal constitutional principles--including principles of Due Process, have been primarily responsible for this erosion. Therefore, Gulesian no longer provides a sound basis for applying a decision prospectively and defeating refunds of illegal exactions.

D. GULESIAN RECOGNIZED A NARROW EXCEPTION TO THE GENERAL RULE OF FULL RETROACTIVITY THAT HAS BEEN CIRCUMSCRIBED FURTHER BY MCKESSON AND ITS PROGENY.

As noted previously, in Gulesian, the Florida Supreme Court denied property tax refunds to Dade County taxpayers who were assessed school taxes based upon a millage in excess of that permitted under the Florida Constitution. In denying refunds, the Court took into account equitable considerations, including the good faith of the school board and the potential hardship on the district.

However, when Broward County argued for similar relief from property tax refunds five years later, the Fourth District Court of Appeal declined to grant it, explaining "...we believe the law to be that a taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment. We construe the Supreme Court's ruling in Gulesian to have carved out a very narrow exception to the taxpayer's right to a refund." Coe v. Broward County, 358 So.2d 214, 216 (Fla. 4th DCA 1978). In responding to Broward County's argument that the refunds would "...result in a disproportionate expense to the county, as compared to the benefit to the average

taxpayer," the Coe Court explained, "[i]f this factor alone is to be determinative of the issue, then the taxpayer would almost never be entitled to refunds of illegally assessed taxes, since there will always be relatively high administrative costs in processing tax refunds. . . . A taxing authority must demonstrate more than the mere expense of processing refunds in order to deny the taxpayers their right to a refund of the illegally assessed taxes." Id. at 217.

Gulesian, Lemon and good faith also were advanced as bases for denying tax refunds to the alcoholic beverage distributers in National Distributing v. Office of Comptroller, 523 So.2d 156, 158 (Fla. 1988). In dismissing the "good faith" argument, the United States Supreme Court responded: "...we do not find this concern weighty in these circumstances," and "...even were we to assume that the State's reliance on a 'presumptively valid statute' was a relevant consideration to Florida's obligation to provide relief for its unconstitutional deprivation of property, we would disagree with the Florida court's characterization of the Liquor Tax as such a statute." McKesson, 110 S.Ct. at 2254-2255.

The McKesson Court also rejected the State of Florida's arguments regarding the costs of issuing refunds. The Court explained:

> We reject respondents' [states'] intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds. McKesson, 496 U.S. at 51, Note 35.

More recently, this Court considered the retroactive remedy issue addressed by McKesson within the context of the challenge to the $295 motor vehicle impact fee. In Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994), this Court approved the trial

court's refund order, explaining: "As the trial court below noted, the impact fee was void from its inception because the legislature acted wholly outside its constitutional powers. The only clear and certain remedy is a full refund to all who have paid this illegal tax." Id. at 726.

In a non-tax case, following the reversal of Florida's ruling in the McKesson case, this Court had occasion to consider whether to apply prospectively its decision striking a workers' compensation law as violative of the single subject rule. Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). The Court ordered prospective application, but Justice Barkett filed a separate opinion, joined by Justices Shaw and Kogan, dissenting from the majority's prospective application ruling. In doing so, Justice Barkett explained:

> I also believe, however, that the majority errs in the prospective application of its opinion. When a court declares a statute facially unconstitutional, it means, in plain English, that the enactment has been null and void from the outset. It is a declaration that the legislature acts outside its power when it contravenes constitutional dictates.
>
> Having decided that this legislative enactment is a facially unconstitutional violation of the single-subject rule, the Court has no power to breathe constitutional life into it for the period between its enactment and the Court's declaration of facial invalidity. How can a court require compliance with an act it says the legislature had no authority to enact? Logically, it cannot, judicial fiat notwithstanding. Id. at 1176.

This dissenting opinion also noted that:

> ...in the past the Court has ordered prospective application of an opinion following a successful constitutional challenge. . . .With all due respect, it did so, as it does here, without analysis and without any logical support. While I sympathize with the administrative difficulties that accompany such a ruling, I do not believe it is the function of the judiciary to suspend constitutional principles to accommodate administrative convenience. Id. at 1177.

As with an unconstitutional statute, it would seem impossible to breathe life into an unlawful assessment ordinance. The assessments at issue have been declared null and void.

Therefore, the Taxpayers are entitled to a refund of their monies which were exacted unlawfully.

CONCLUSION

The Arizona Supreme Court has opined that: "An honorable government would not keep taxes to which it is not entitled..." Pittsburgh & Midway Coal Mining Company v. Arizona Dept. of Revenue, 776 P.2d 1061, 1065 (Arizona 1989). The FHBA submits that an honorable government cannot keep taxes to which it is not entitled. Therefore, the FHBA respectfully requests that this Court answer the Certified Question by ruling that Gulesian is overruled and will no longer serve in Florida as a basis for denying the refund of illegal exactions, assessments and taxes.

Respectfully submitted,

ROBERT M. RHODES
Florida Bar No. 183580
VICTORIA L. WEBER
Florida Bar No. 266426
Steel Hector & Davis LLP
215 South Monroe, Suite 601
Tallahassee, Florida 32301
(904) 222-2300

KEITH C. HETRICK
Florida Bar No. 0564168
Florida Home Builders
Association
201 East Park Avenue
Tallahassee, Florida 32301
(904) 224-4316

COUNSEL FOR AMICUS CURIAE
FLORIDA HOME BUILDERS ASSOCIATION

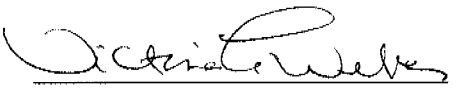
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of Florida Home Builders Association's Brief of Amicus Curiae was furnished by U.S. mail this the 30th day of April, 1996, to the following:

Larry E. Levy, Esquire
Loren E. Levy, Esquire
Law Offices of Larry E. Levy
Post Office Box 10583
Tallahassee, Florida 32302

Edwin B. Browning, Jr., Esquire
George T. Reeves, Esquire
Davis, Browning & Schnitker
Post Office Drawer 652
Madison, Florida 32341

Kenza Van Assenderp, Esquire
Young, Van Assenderp & Varnadoe
Post Office Box 1833
Tallahassee, Florida 32302



Victoria L. Weber

TAL/15191-1